

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

June 14, 2006

In the Matter of
James H. Pollock

Docket No. 2006-077
File No. PAN-SE-06-3T-010
Middleborough

RECOMMENDED FINAL DECISION

James H. Pollock filed a Notice of Claim for an adjudicatory hearing seeking review of a Notice of Intent to Assess a Civil Administrative Penalty (PAN) issued pursuant to M.G.L. c.21E, the Massachusetts Oil and Hazardous Materials Release Prevention and Response Act, and M.G.L. c. 21A, §16, the Civil Administrative Penalties Act. The petitioner's initial filing did not include a number of items required to file an effective appeal, and an Order to File a More Definite Statement was issued requiring submission of a copy of the appealed document, and offering both the petitioner and MassDEP the opportunity to submit any relevant evidence or argument on the question of the timeliness of the petitioner's Claim.

The petitioner responded by explaining that over fifteen years ago an incident involving some kind of release occurred. Mr. Pollock states that he has consulted with Mr. Tim Burbank, associated with Global Environmental, a company that may be moving onto the property, and that the company is planning to conduct a full 21E assessment of the property very soon. He considers the penalty issued to him unfair as it concerns a "forgotten" release which occurred prior to his ownership of the property. The petitioner also provided a copy of a Notice of

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Noncompliance dated January 26, 2006 directed to the petitioner, but did not provide a copy of the PAN.

The Department moved to dismiss this Claim for lack of jurisdiction because of untimeliness, arguing that the Claim was filed after the time period established for requesting an adjudicatory hearing. In support of its Motion, the Department supplied a copy of the PAN.

The analysis of the timeliness of the Claim must begin with the date of issuance of the appealed document. “Date of issuance” for a PAN is defined in the Department’s regulations at 310 CMR 5.08, and depends upon the method used by the Department for its delivery. When a PAN is delivered by hand, as it was here, the document is deemed issued on the date it is delivered. 310 CMR 5.08(1). A request for an adjudicatory hearing concerning a PAN must be *received* by the Department by the twenty-first day after its issuance. 310 CMR 5.35. If no request is received by the Department by the twenty-first day, the person to whom the PAN is directed waives their right to appeal the civil assessment. Id.

The PAN in this matter is dated April 4, 2006, but was served by hand delivery to the petitioner’s last known address on April 6, 2006 by the Plymouth County Sheriff’s Office. Motion to Dismiss, Exhibit 2. The date of issuance of this PAN is therefore April 6, 2006. Twenty-one days after that day, and the last day a request for an adjudicatory appeal would be timely, was April 27, 2006. The next question to be answered is whether the Department received the petitioner’s Notice of Claim on or before April 27, 2006.

The Claim filed by the petitioner was made on a form supplied by the Department. It was signed by Mr. Pollock on May 30, 2006, mailed on May 4, 2006 with the appeals filing fee to the Department’s lockbox, and was forwarded from there to the Office of Appeals and Dispute Resolution. The date of receipt in the Office of Appeals and Dispute Resolution was May 9,

2006. The transaction date on the slip from the Department's Lockbox (accompanying a photocopy of the check for the appeal filing fee) has a date of May 5, 2006.

I find that the Claim was mailed on May 4, 2006 and was received by the Department at the earliest later on the same day it was mailed, May 4th or the date on the lockbox transaction slip, May 5, 2006. In either case, the Claim is untimely as the Department received it after the twenty-one day time period ended on April 27, 2006. Indeed, the petitioner did not sign the form used as the Claim until three days past the deadline for filing the Claim on April 30, 2006.

The deadline for filing a Claim for an adjudicatory appeal "is not simply a procedural formality which may be waived by the Department," instead, failure to comply with the time requirement "is a jurisdictional defect, and requires dismissal of the appeal." Matter of Treasure Island Condominium Association, Docket No. 93-009, Final Decision (May 13, 1993). See also Matter of Sunoco Inc., (R&M), Docket No. 2003-035, Recommended Final Decision (September 16, 2003) adopted by Final Decision (October 1, 2003); Matter of Parks, Docket No. 88-206, Final Decision-Order of Dismissal (April 9, 1991). Once the right to request an appeal is waived, the Department has no jurisdiction to consider the claim, and dismissal must follow.

Because the petitioner's Claim for an adjudicatory hearing on the PAN was received after the statutory and regulatory time period for making such a request, it is untimely, and the petitioner has waived his right to request such a hearing. I recommend its dismissal for lack of jurisdiction pursuant to 310 CMR 1.01(5)(a)15.f.v.

NOTICE

This decision is a recommended final decision of the Presiding Officer. It has been transmitted to the Commissioner for his final decision in this matter. This decision is therefore

not a final decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's final decision is subject to the rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this recommended final decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion directs otherwise.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Ann Lowery
Presiding Officer

Adopted by Commissioner Robert W. Golledge, Jr., June 15, 2006.